PP

v.

DAVID ACKOWUAH BONSU

HIGH COURT MALAYA, ALOR SETAR
HISHAMUDIN YUNUS J
[CRIMINAL TRIAL NO: 45-8-97]
30 DECEMBER 1998

CRIMINAL PROCEDURE: *Arrest - What constitutes arrest - Whether accused under 'constructive arrest' - Whether there was reasonable suspicion of arrestable offence - Meaning of words "tahan", "tangkap" and "tangkapan" - Caution statement - Administering of caution - Consideration of Customs Act 1967, ss. 103(2) & 113*

EVIDENCE: *Statement - Caution statement - Whether caution administered - Whether caution explained - Whether statement voluntary - Whether and when accused arrested*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39(B)(1)(a) - Trafficking in herion - Presumption of trafficking - Section 37(da)(i) - Whether to rebut presumption on a balance of prohabilities or merely to raise a reasonable doubt*

The accused, a foreign citizen, was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") for trafficking in 743.8g of heroin. According to the prosecution's witness, SP2, a customs officer, he was on duty at the customs checkpoint at the Malaysia-Thai border when he saw the accused carrying a green bag coming out from the area reserved for intensive inspection of passengers of vehicles. The accused appeared anxious. SP2, who was not in uniform, approached the accused, showed him his authority card and directed the accused to a bench for inspection. The inspection was carried out together with SP3, another customs officer. A black folder with three magazines inside was discovered in the green bag. The weight of the folder aroused the suspicion of the two officers who handed it to their superior officer, SP4. SP4 returned the folder to the accused and instructed SP2 to escort the accused to the customs office. At the office, SP4 removed the black folder from the bag and placed it on a table. He then asked another officer, SP5, to probe the folder using a probe needle. As SP5 was about to do so, the accused said in English, "Don't use the big pin, you spoil my thing." When the needle was drawn out from the cover of the folder, a white powdery substance, suspected to be a drug, had stuck to the tip of the needle.

The accused was arrested by SP4 and a Superintendant of Customs, SP6, administered the caution under s. 37A of the Act after ascertaining that the accused understood English. Thereafter, SP6 showed the accused the folder and asked him where he got it to which the accused replied that his friend had given it to him. The accused was taken by SP4 to the customs office Alor Setar, where the accused was referred to the investigating officer, SP8, who slit open the cover of the folder and found concealed therein packages sealed with tape. The packages were sent to the chemistry department Pulau Pinang where the substance was confirmed to be heroin. The evidence of SP2 was corroborated by that of the other officers.

The defendant objected to the admissibility of the oral caution statement claiming that SP6 had not explained the caution to the accused and that the accused had been induced or threatened into giving the caution statement or that it was as a result of a promise. A trial within a trial was held to determine the admissibility of the oral cautioned statement.

At the trial proper, the defendant objected to the admissibility of his own statement, "Don't use the big pin, you spoil my thing," contending that no caution under s. 37A of the Act had been administered to the accused when he was already under 'constructive arrest'. Counsel based his contention on the fact that the accused was escorted by SP2 while on the way to the customs office and also on the use of the words "ditahan" by SP2 in his testimony. It was submitted that the word "tahan" meant "arrest". Counsel submitted that there was a break in the chain of evidence as there was no evidence by the prosecution as to who was keeping the exhibits during the period after SP8 had taken them back from the chemist before he handed them over to the Assistant Superintendant of Customs, SP9. In his testimony, the defendant wholly denied possession of the folder and the drugs in it and alleged that the prosecution case was nothing but a frame up by the customs officers.

Held:

[1] At the end of the trial within a trial, the court was satisfied that the objections were not supported by evidence and hence were baseless. The court was also satisfied beyond reasonable doubt that the caution had been properly administered, that the accused gave the oral statement voluntarily, and therefore the caution together with the caution statement were admissible.

[2] There was no evidence that the accused was under arrest when he was escorted by an officer to the customs office, be it 'constructive arrest' or actual. At that stage, the drug had not yet been recovered from the folder. Therefore, there was no reasonable suspicion of the commission of an

offence by the accused. The officers were merely entertaining a lingering suspicion in their minds that there could be something hidden in the folder because of its unusual weight. Having the accused escorted by an officer was merely a prudent precautionary measure which did not amount to an arrest.

[3] It is not correct to say that "tahan" means "arrest". The Bahasa Malaysia term for "arrest" is "tangkap" or "tangkapan". The word "tahan" means either "to detain" or "to stop", but in the context it was used by SP2, it merely meant to stop the accused to make inquiries and if necessary to carry out a search, as the officers were entitled to do under ss. 103(2) and 113 of the Customs Act 1967.

[4] In the absence of any evidence to suggest otherwise, it was fair to infer that the exhibits were in the custody of SP8, the officer who had kept them in a steel cabinet under lock before sending it to the chemist, SP1, for analysis. It was this very officer who subsequently collected them back from SP1, and who later handed them over to SP9. There was also evidence that both SP8 and SP9 had signed a handing over list on the said date.

[5] At the close of the case for the prosecution, the court was satisfied beyond reasonable doubt that the prosecution had made out a case against the accused, which if unrebutted, would warrant his conviction, and had no difficulty in invoking the presumption under s. 37(da)(i) of the Act. In view of the nature of the defence, where possession of drugs was totally denied by the accused, the question of rebutting the presumption of trafficking in heroin on a balance of probabilities did not arise. The accused had only to raise a reasonable doubt.

[6] The accused had failed to raise a reasonable doubt against the prosecution's case as there was never any suggestion put by the defence to the prosecution witnesses that the prosecution case was a fabrication. Further, there was no reason why the prosecution witnesses should go all out to conspire to commit perjury merely to get the accused convicted.

[Accused guilty as charged.]

Case(s) referred to:
Dalip Singh v. Bhagwan Singh [1997] 4 CLJ 645 ***(refd)***
KJ Barlow v. PP [1987] 2 CLJ 286 ***(refd)***
Mohd Hassan v. PP [1998] 2 CLJ 170 ***(refd)***
PP v. Kang Ho Soh [1991] 3 CLJ 2914 ***(refd)***
PP v. Tan Chye Joo [1989] 2 MLJ 253 ***(refd)***
Shaaban & Ors v. Chong Fook Kam & Anor [1969] 2 MLJ 219 ***(refd)***
Yong Su Wan v. PP [1998] 3 CLJ Supp 419 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 15, 180
Customs Act 1967, ss. 103(2), 113
Dangerous Drugs Act 1952, ss. 37(d), (da)(i), 37A, 39B(1)(a), (2)

For the prosecution - Alauddeen Ismail DPP
For the accused - Adi Satria

Reported by Cindy Chan

JUDGMENT

Hishamudin Yunus J:

The charge against the accused, a citizen of Ghana, is as follows:

> Bahawa kamu, pada 20 Ogos 1996, jam lebih kurang 11.50 pagi di Pejabat Kastam Cawangan Pencegah, Jabatan Kastam dan Eksais Diraja Malaysia, Kompleks Imigresen, Bukit Kayu Hitam, di dalam daerah Kubang Pasu, di dalam Negeri Kedah telah didapati mengedar dadah berbahaya iaitu 743.8 grams Heroin dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 (Akta 234, semakan 1980) yang boleh dihukum di bawah seksyen 39(B)(2) Akta yang sama.

The following is the case for the prosecution. One of the main witnesses for the prosecution was Customs Officer Encik Mohd Yusof bin Abdul Rahman (SP2) attached to the Customs Preventive Division, Alor Setar. He said in evidence that at the material date and time (20 August 1996) he was on duty at the Customs checkpoint at the Immigration Complex, Bukit Kayu Hitam, at the Malaysia-Thai border. He was, on that day, taking part in a departmental operation known as "Operasi KOMO". The purpose of the operation was to prevent the smuggling of goods, including drugs, into the country. At the checkpoint, he was stationed at the area reserved for the intensive inspection of passengers of vehicles.

SP2 testified that at about 11.40am he saw the accused carrying a green bag in his right hand coming out from the said area. The accused was looking left and right and appeared to be in a state of anxiety. SP2, who was then not in uniform, approached the accused and showed the latter his authority card. He observed that the accused had a pouch bag strapped to his waist. SP2 directed the accused to go to a bench for inspection.

The inspection was carried out by SP2 together with another officer, Encik Fairuzi bin Omar (SP3). SP2 inspected the accused's passport, while SP3 inspected the accused's bag. SP2 further testified that SP3 asked the accused to open his bag. Then SP3 showed him (SP2) a black folder. Inside the folder were three Asiaweek magazines. The weight of the folder aroused the suspicion

of the two officers. SP2 referred and handed over the folder to his superior officer, Senior Customs Officer Encik Mohd Azri bin Dato' Ahmad (SP4), who by then had came over to the spot where the two officers were. SP4 gave back the folder to the accused and asked him to put the folder back into his bag; and he instructed SP2 to escort the accused and to follow him (SP4) to the Customs Preventive Office located within the Complex.

SP2 further said that, at the office, the accused was asked to place his bag on a table and to sit near the bag, and he was instructed to sit next to the accused. SP4 took out the black folder from the bag and placed it on the table. He then called for another Customs Officer, Encik Abdullah bin Hj. Hamid (SP5), to assist in the inspection. The latter was directed to probe the folder by using a probe needle. As SP5 was about to probe the folder, the accused said, in English:

> Don't use the big pin, you spoil my thing.

When the needle was drawn out from the cover of the folder, SP2, SP4 and SP5 saw a white powdery substance, suspected to be drug, sticking at the tip of the needle. As a result of this discovery, the accused was arrested by SP4.

The evidence of SP2 was corroborated by the evidence of SP3, SP4 and SP5. SP3 said that during the inspection at the bench he unzipped and opened the accused's bag and found the black folder inside it.

Before I proceed further to narrate the sequence of events, as unfolded by the testimonies of the prosecution witnesses, I pause here to deal with an objection by the defence regarding the admissibility of the following statement allegedly made by the accused, that is:

> Don't use the big pin you spoil my thing.

The defence contended that this statement was inadmissible because, at the time it was uttered, no caution under s.37A of the Dangerous Drugs Act 1952 (the "DDA") was administered to the accused whereas he was then already under "constructive arrest" (note that learned counsel used the words "constructive arrest" – I will say more of this term later). The defence contended that the accused was already under constructive arrest then because the evidence showed that he was escorted by SP2 while on the way to the Customs Preventive Office and also while in the office. Moreover, SP2, in his evidence, had used the words "ditahan" in the context:

> Saya tidak tahan lelaki itu berdasarkan maklumat

Encik Karpal Singh submitted that "tahan" means "arrest". (This submission was later adopted by Encik Adi Satria who took over from Encik Karpal as defence counsel.)

SP4 in his evidence said that the accused was never under arrest before the discovery of the heroin. He said the accused was arrested only after the substance suspected to be drug was discovered from the folder.

In my judgment, there is no evidence to suggest that the accused was under arrest then, be it "constructive arrest" (if I may also use this term for the moment) or actual. At that stage, the drug had not yet been recovered from the folder. Therefore there was no **reasonable** suspicion of the commission of any offence by the accused. The officers were merely entertaining a lingering suspicion in their mind that there could be something hidden in the folder that offends the law because of the unusual weight of the folder.

The Privy Council, in *Shaaban & Ors. v. Chong Fook Kam & Anor* [1969] 2 MLJ 219 held (at p. 221):

> Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove"

On the meaning of reasonable suspicion, the Privy Council held (at p. 221):

> The test of reasonable suspicion prescribed by the (Criminal Procedure) Code is one that has existed in the common law for many years. The law is thus stated in *Bullen and Leake* 3rd edition, p. 795, the "golden" edition of 1868:
>
> > A *constable* is justified in arresting a person without a warrant, upon a reasonable suspicion of a felony having been committed and of the person being guilty of it.

Having the accused escorted by an officer while on the way to the Customs Preventive Office and also while in the office was merely, in my opinion, a prudent precautionary measure taken by the authority and by no means is it justified to say that such measure amounts to an arrest. Indeed, since the officers had entertained a lingering suspicion in their mind, it would have been careless and unprofessional on their part if no escort was provided, for the accused might have absconded or tampered with potential exhibits. In any case, the Customs Officers were empowered by the law to do what they did and it appears to me that they were merely exercising their powers under ss. 103(2) and 113 of the Customs Act 1967. I think it would be rather far-fetched and, indeed, legally inappropriate to suggest that each time a person enters this country he is deemed to be under "constructive arrest" whenever a Customs Officer at the checkpoint stops him in order to carry out a search on his person or goods in the exercise of the powers under the said provisions of the Act. Further, and with respect to counsel, it is not correct to say that "tahan" means "arrest". The Bahasa Malaysia term for the word "arrest" is "tangkap" or "tangkapan", and not "tahan". The word "tahan" means either "to detain" or "to stop", but in the context that word was used by SP2, it merely means to

stop the accused to make inquiries and if necessary to carry out a search, as he was entitled to do under ss. 103(2) and 113. To be fair to the prosecution, SP2 used the word "tahan" only once in his testimony and in what sense that word was used can only be fully understood if one were to look at the evidence and the context in which that word was used. This was what the witness actually said:

> Dalam menjalankan tugas pemerhatian saya, saya telah melihat seorang lelaki berkulit hitam membawa sebuah beg berwarna hijau dipegang di tangan kanannya; berjalan keluar daripada tempat pemeriksaan penumpang van dan bas; dan saya melihat dia memandang kiri dan kanan dan agak gelisah. Saya terus menghampiri beliau lalu menunjukkan kad kuasa saya menjelaskan Jabatan saya, maksud saya memperkenalkan diri saya kerana saya tidak beruniform ketika itu. Saya ada tunjuk kad kuasa saya. Kejadian berlaku lebih kurang 11.40 pagi. Kali pertama saya melihat dia, jarak saya dengan dia ada lebih kurang 5 meter. Dia pakai T-shirt berwarna hitam berjalur putih dan seluar jenis jean berwarna putih susu. Ada sebuah beg "pouch" pada badannya yang berwarna hitam. Saya telah mengarahkan pemuda itu ke kerusi tempat menunggu penumpang untuk membuat pemeriksaan barangan dan beg itu, dan juga dokumen perjalanan beliau. **Saya tidak tahan lelaki itu berdasarkan maklumat.** Saya arahkan pemuda itu ke tempat menunggu penumpang-penumpang untuk membuat pemeriksaan. Pemeriksaan itu dilakukan oleh saya bersama Pegawai Kastam Pencegah 4869 Encik Fairuzi bin Omar; di mana pada masa itu saya memeriksa paspot pemuda itu dan Fairuzi memeriksa beg pemuda itu. [Emphasis is mine]

Now, on the term "constructive arrest" as used by learned defence counsel, first of all, the term is not found in our Criminal Procedure Code. Section 15 of the Criminal Procedure Code merely provides:

> **15. Arrest, how made.**
>
> (1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action.
>
> (2) If such person forcibly resist the endeavour to arrest him or attempt to evade the arrest such officer or other person may use all means necessary to effect the arrest.
>
> (3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

Encik Karpal, in his submission, did not cite any authority to support his contention; but his successor, Encik Adi Satria cited *Pendakwa Raya v. Kang Ho Soh* [1992] 1 MLJ 360 wherein at p. 367 Shankar J (as he then was) said:

> With respect to the industry of counsel and the DPP I feel I ought to say something here about the system of judicial precedent. That statements made by an accused person after his arrest are inadmissible, unless the statutory preconditions laid down by section 37A of the Act are satisfied, is of course a matter of law. But whether in a particular case a person was under actual arrest at a given moment in time is a question of fact, to be decided according to the circumstances of each case.

The learned DPP, on the other hand, cited s. 103(2) of the Customs Act 1967. This section states:

> **103. Baggage of passengers.**
>
> (1) Notwithstanding anything in this Act contained, every passenger or other person arriving in or leaving Malaysia shall declare all dutiable or prohibited goods in his possession, either on his person or in any baggage or in any vehicle, to the proper officer of customs, and if fails so to do such goods shall be deemed to be uncustomed goods.
>
> (2) The baggage of passengers may be examined and delivered in such manner as the Director General may direct, and it shall be the duty of the person in charge of such baggage to produce, open, unpack and repack such baggage.

Perhaps the learned DPP overlooked s. 113 of the Act that I have just mentioned. This section states:

> **113. Searching of persons arriving in Malaysia.**
>
> Any person ... entering or having recently entered Malaysia by road or railway shall, on demand by any proper officer of customs either permit his person, goods and baggage to be searched by such officer, or together with such goods and baggage accompany such officer to a customs office or police station and there permits his person, goods and baggage to be searched by an officer of customs ...

In addition, learned DPP cited the following authorities:

(a) *Shaaban & Ors. v. Chong Fook Kam & Anor* [1969] 2 MLJ 219;

(b) *Public Prosecutor v. Tan Chye Joo* [1989] 2 MLJ 253;

(c) *K.J. Barlow v. Public Prosecutor* [1987] 2 CLJ 286; [1986] 2 MLJ 104; and

(d) *Kang Ho Soh* (already cited).

The DPP urged the court to appreciate the fact that, at the time the alleged statement was uttered by the accused, nothing incriminating has yet been found on him and thus the officers concerned had, at that point of time, no reasonable suspicion to effect an arrest. Indeed, SP2 and his superior officer, SP4, did not in their evidence say that the accused was already under arrest then.

In *Shaaban,* the respondents sued two police officers and the Government of Malaysia for false imprisonment. The facts were that the respondents were arrested and detained by the police. The police suspected that one or other of the respondents was driving the lorry from whose trailer timber fell which hit the windscreen of a car and two men in the car causing the death of one of them. The lorry did not stop. The respondents who were interrogated after the arrest denied that they were at the place of the accident. However, before the arrest, what had happened was as follows, as concisely narrated by the Privy Council judgment (at p. 219-220):

> Police inquiries led them to conclude that the incident had occurred as stated and that the lorry involved in it was numbered PC 8200. It is unnecessary to give details of the enquiry up to this point since it is not disputed that the police had reasonable grounds for reaching this conclusion. Directions were given that the lorry PC 8200 was to be stopped and detained.
>
> At 7.55 a.m. on 11 July PC 22927 of Bukit Tinggi police station found the lorry stationary in front of a coffee shop about a quarter of a mile from the police station. He found and detained the two plaintiffs, one of whom admitted to being the driver of the lorry and the other the attendant. The corporal in charge of the station arrived 10 minutes later. According to his evidence (the police evidence generally was accepted by the trial judge) one of the plaintiffs "asked me what wrong he had done. I told him that I had received instruction from Mentakab to detain him on suspicion of a fatal road accident".

The next relevant part of the judgment reads as follows:

> The law on arrest is contained in the **Constitution** and the **Criminal Procedure Code**. For the purposes of this case it is enough to say that under section 23(i)(a) of the **Code** the police were empowered to arrest the Plaintiffs if a reasonable suspicion existed of their having been concerned in an offence of reckless and dangerous driving causing death. **In any case of wrongful arrest it is important to identify at the outset the precise time of arrest,** not only for the purpose of article 5 clause (3) of the **Constitution,** which provides that an arrested person shall be informed as soon as may be thereafter of the grounds of his arrest, but also because it is the time when the existence of a reasonable suspicion must be proved. [emphasis is mine]

Now, in *Shaaban,* the Privy Council ruled (at p. 220) that:

> An arrest occurs when a police officer states in terms that he is arresting or when he uses force to restrain the individual concerned. **It occurs also when by words or conduct he makes it clear that he will, if necessary, use force to prevent the individual from going where he may want to go.** It does not occur when he stops an individual to make enquiries. [emphasis is mine]

Having laid out the facts of the case and formulated the principles, the Privy Council then proceeded to rule as to the precise time when the arrest occurred. Lord Devlin, delivering the judgment of the Judicial Committee, held (at p. 220):

> [The arrest] does not occur when [the police officer] stops an individual to make inquiries. The moment when it occurred in this case was between 8.05 and 9 a.m. on 11th July when (their Lordships have quoted the relevant passage from the evidence) the corporal told the plaintiffs of the existing suspicion and said that he had instructions to detain them.

However, at a later part of the judgment the Privy Council ruled that the arrest by the corporal was a wrongful arrest on the grounds (at p. 221-221):

> At that point of time the police had good reason to suspect that one or other of the plaintiffs was driving the lorry from whose trailer the piece of timber fell. But there is a wide gap between a suspicion that one of the plaintiffs was the man driving the lorry and a suspicion that he was driving it recklessly or dangerously. The trial judge did not acknowledge the existence of such a gap ... Their Lordships conclude that the suspicion that the plaintiffs or either of them was guilty of reckless driving was not reasonable.

It is very pertinent to observe in the above case that although according to the facts police constable PC 22927 of Bukit Tinggi police station had on 11 July at 7.55am detained the two respondents in connection with the accident, when he found them near a coffee shop, yet the Privy Council impliedly held that such detention did not amount to an arrest. The Judicial Committee ruled that the arrest occurred only when the constable's superior, the corporal in charge of the station, arrived ten minutes later and told the respondents that he had received instruction from Mentakab to detain them on suspicion of a fatal road accident case.

In the case before me, perhaps what learned counsel, Encik Karpal, meant by "constructive arrest" is the situation envisaged by Lord Devlin (who delivered the judgment of the Privy Council) in one of the above passages quoted wherein his Lordship (to repeat) stated:

> It occurs also when by words or conduct he makes it clear that he will, if necessary, use force to prevent the individual from going where he may want to go.

Although the particular passage concerned (which contains the above sentence) refers to a police officer, it hardly needs stating here that the principles enunciated therein equally apply to customs officers (and also to other enforcement officers armed with statutory power of arrest).

Even though the facts of *Shaaban* are not on all fours with the facts of the present case, the principles as enunciated therein still apply, and applying the principles to the facts of the present case, in my judgment, in the case that is now before me it could not be said that the conduct of the customs officers in relation to the accused, prior to the discovery of the drug, tantamount to constructive arrest in the sense as might have been suggested by Encik Karpal. To reiterate what I have said, the officers were merely exercising their powers under the Customs Act, in particular, ss. 103 and 113, and that the escorting of the accused was merely a prudent departmental act. It is, I feel, also quite relevant to add here that prior to the making of the alleged statement, the accused had obediently complied with whatever instructions given by the officers, and he had never attempted to obstruct or to run away. There was no occasion when the officers had to resort to the use of physical force or words to restrain his movements.

Lest that I might be misunderstood, I wish to make it clear here that I am not suggesting that the existence of reasonable suspicion is legally an essential factor in every case where an enforcement officer detains a person before the court can infer that such act of detention amounts to constructive arrest. Human experience shows that time and again it does happen where an inexperienced or over zealous officer of an enforcement agency actually arrests a person, or does some act which can be construed as amounting to constructive arrest, even if the officer does not have any reasonable suspicion of the commission of an arrestable offence by that person (in such a situation the arrest, constructive or actual, becomes a wrongful arrest), as has, indeed, happened in *Shaaban.* All that I am saying is that the presence or the absence of a reasonable suspicion is an important factor to be taken into account by the court in deciding whether or not there is constructive arrest in a given situation.

Coming back to the sequence of events of the present case, after the discovery of the heroin, about twenty-five minutes later a Superintendent of Customs, Encik Saidi bin Ismail (SP6), came to the room and asked the accused whether he could understand English, and the accused answered "Yes". Then SP6 administered the caution under s. 37A of the Dangerous Drugs Act 1952 and the accused was asked whether he understood the caution, and again the accused answered in the affirmative. Thereafter, SP6 showed the accused the folder and asked:

> Where do you get this thing?

The accused answered:

> My friend gave to me.

The defence objected to the admissibility of this oral cautioned statement, but I shall deal with this objection later. Later the same day, at about 1.40pm the accused was taken by SP4 (accompanied by SP2 and SP3) to the Customs Office at Alor Setar. There, the accused was referred to the investigating officer, Customs Superintendent Encik Mohd Sultan bin Abdul Hamid (SP8) who slit open with a knife both the right and left covers of the folder; and he found concealed inside each of the covers a package sealed with a tape.

The packages found inside the folder covers were sent to the Chemistry Department Pulau Pinang. The Government Chemist (SP1) who analysed the substance confirmed that the substance found inside the packages was heroin weighing 743.8 grams.

There was an objection by the defence to the admissibility of the cautioned oral statement. The reasons for the objection, as given by the learned defence counsel, Encik Adi Satria, were as follows:

(a) SP6 did not explain the caution and thus the accused did not understand the caution;

(b) The accused was induced to give the cautioned statement;

(c) The accused was threatened into giving the statement; and

(d) The accused gave the statement as a result of a "promise" by SP6.

In order to determine the admissibility of the oral cautioned statement, I held a trial within a trial. At the trial within a trial, however, the accused's evidence did not touch at all the matters complained of by him through his counsel (ie, reasons (a) to (d) above). Instead, in his evidence, he alleged that he never met SP6 at all and that no caution was ever administered to him! At the conclusion of the trial within a trial, I was satisfied that the objections were not supported by the evidence and hence were baseless; and I was also satisfied beyond reasonable doubt that the caution had been properly administered, that the accused gave the oral statement voluntarily, and therefore the caution together with the cautioned statement were admissible.

The learned defence counsel also made an issue of the fact that the cautioned statement was not reduced to writing by SP6. With respect, I see no merit in this contention because it is clearly provided in s. 37A of the DDA that the statement could be either oral or in writing. Moreover, the question asked was short, simple and straightforward; and so was the accused's reply. There was, therefore, no compelling reason to put them in writing.

At the end of the case for the prosecution, after hearing submissions, I was satisfied beyond reasonable doubt that the prosecution had made out a case against the accused, which if unrebutted would warrant his conviction. Perhaps, I should also add here that in view of the date of the alleged offence, which was prior to the recent amendment to s. 180 of the Criminal Procedure Code, which introduces the *prima facie* principle, both the learned DPP and defence counsel urged me, and I think correctly, to adopt the principle as enunciated by the Federal Court in *Dalip Singh v. Bhagwan Singh* [1997] 4 CLJ 645; [1997] 4 AMR 4029.

The learned Deputy Public Prosecutor, in his submission asking the court to call on the accused to enter his defence, urged the court to invoke the presumption s. 37(da)(i) of the DDA. The learned DPP made it clear that in view of *Mohd Hassan v. Public Prosecutor* [1998] 2 CLJ 170, he was *not* relying on the presumption under s. 37(d) of the Act.

On the evidence, I had no difficulty in invoking the presumption under s. 37(da)(i) of the DDA. I was satisfied beyond reasonable doubt that the accused was in possession of the heroin. There was clear evidence that he was carrying the bag containing the folder, and that the folder belonged to him. The ingenious manner in which the drug was concealed underneath the skin of the folder covers shows that he knew that he was carrying heroin. There was also the evidence regarding the reaction of the accused when the heroin was seen sticking at the tip of the needle: he was silent and sweating, although the room was air-conditioned.

Encik Adi Satria, in his submission raised three points which I found unacceptable.

First, he submitted that the prosecution had failed to prove beyond reasonable doubt that the folder was under the custody and control of the accused *from the time he entered the country* right up to the time he was arrested. With respect, there is no merit in this argument. For the purpose of the charge, there was no necessity on the part of the prosecution to prove that the accused was having custody and control of the folder from the moment he entered this country. All the prosecution need to prove was that the accused was in possession of the folder at the time of the inspection at the bench by SP2 and SP3.

Second, the learned counsel, in his submission, urged me to review my decision regarding the admissibility of the statement allegedly made by the accused to the effect –

> Don't use the big pin, you spoil my thing.

I saw no reason to do so for I was satisfied that the accused at the time he made the alleged statement was not yet under arrest. I have already given my reasons and I do not propose to repeat them here.

The third ground given by learned counsel was that there had been a break in the chain of evidence as regards the handling of the exhibits in that there was no evidence given by the prosecution as to who was keeping the exhibits during the period after SP8 had taken them back from the chemist, SP1, on 16 September 1996 but before he handed them over to Assistant Superintendent of Customs Encik Mohd Yusof bin Hj. Jaafar (SP9) on 29 June 1997. With respect, there is also no substance in this argument. In the absence of any evidence which might suggest otherwise, it is to my mind fair to infer that the exhibits were in the custody of SP8, the very officer who had kept them in a steel cabinet under lock before he sent it to SP1 for analysis. It was this very officer who subsequently collected them back from SP1, and who later handed them over to SP9 on 29 June 1997 before he went on transfer to Johor Bahru. There is also evidence that both SP8 and SP9 signed a handing over list (exh. P37) on 29 June 1997.

Before I proceed to deliberate on the defence, there is one more thing that I feel compelled to touch on. During the prosecution case, after SP6 had completed his testimony, the accused informed the court that he wished to change his assigned counsel, Encik Adi Satria, on the grounds "I have lost confidence in the service of my counsel. He is not properly representing me the way I expected." The court must consider such a complaint as this with great caution because the matter concerned the integrity and reputation of the assigned counsel concerned who, we have to bear in mind, is an officer of the court. After hearing the submissions by Encik Adi Satria and the learned DPP, who did their best to guide me on the matter, I decided to disallow the request because for the court to entertain such a request good reason must be given. I did not consider that the accused had given the court any good reason. On the contrary, I was of the view that what the accused had told the court regarding his counsel was nothing but a bare and vague allegation.

The accused in making his defence elected to give evidence on oath. In his evidence, he said he lived in Accra, Ghana, and was a businessman specialising in ready-made textiles. Prior to his entry into Malaysia on the day in question he was in Thailand, the country from which he procured his ready-made textiles. His purpose of coming to Malaysia was to apply for a visa at the Thai consulate in Penang. He came by bus through Sadao, Thailand.

On arrival at the immigration checkpoint at Bukit Kayu Hitam Immigration Complex he went through the normal procedures: he had his passport cleared, he had his baggage cleared at the police scanning machine, and he also had his baggage cleared by the customs.

After the customs clearance, he claimed that two men who were not in uniform and who did not identify themselves again checked his baggage. After inspecting, the men were satisfied with his baggage and they asked him to proceed.

According to the accused, he then proceeded to the public lounge to wait for his bus. He sat on a long bench together with other members of the public. About five minutes later SP3 (Encik Fairuzi) came and told him that he wanted to check his (accused's) bag. The accused told SP3 that his bag had already been inspected but the latter insisted.

SP3 asked the accused to open his bag and to bring the contents out. The accused complied. As the accused started to take out his personal effects from the bag, the other members of the public seated on the bench got up and moved away. The accused then put his personal effects on the bench. After the accused had taken out all his things from the bag, SP3 started to inspect the bag as well as the personal effects. Having finished with the inspection, SP3 said "O.K." to the accused and asked the latter to put back his things into the bag. As the accused was about to do so, and as SP3 was about to move away, the latter saw a black folder on the bench about three feet away from the accused. SP3 asked the accused as to the ownership of the folder and the accused replied that he did not know. SP3 picked up the folder and brought it to the accused and asked whether the latter was certain that it was not his. The accused maintained that the folder did not belong to him. According to the accused, SP3 then cried out to the crowd inquiring as to the ownership of the file folder but no one came forward to claim it. Thereafter SP3 insisted that the file folder belonged to the accused. When the accused still denied that it was his, SP3 held the accused's hand and insisted that the accused follow him to the office. The accused said that he refused to follow and that a quarrel ensued between him and SP3, in the course of which he pushed SP3 to the ground. It was at this point that SP2 appeared and pacified the two of them. Upon being persuaded by SP2, the accused followed him and SP3 to the office. The accused alleged that SP4 was never present at the time of the quarrel. SP4 only came into the picture later, that is when he came into the office after the accused had entered the office with SP2 and SP3.

The accused, in evidence, conceded that SP4 did ask SP5 to probe the file folder and that a white powder was seen sticking to the probe needle. However, the accused denied saying:

> Don't use the big pin, you spoil my thing.

According to the accused, in the office the officers started searching through his things again but this time they were handling them roughly. This prompted him to say to them:

> You are spoiling my things.

According to the accused it was SP4 who put to him the question:

> Who owns this?

But the accused in his evidence did not say in relation to which object was the question asked. This is what the accused actually said:

> Then they asked who owns the individual items in the bag. Then I showed him the items that are mine by purchase, and those that I borrowed from people. After [that] they started searching the items one after another again. Now they are doing it very roughly. So I quarreled with them and said, "You are spoiling my things." Then Azri asked them to take it easy. It was at this very juncture that they asked me, "Who owns this?" If the material was not the one that I bought myself then I would answer him, "My friend gave it to me." It was Azri who asked me about the ownership.

In short, the nature of the defence is that the possession of the drug is totally denied and that the prosecution case is nothing but a frame up by SP2, SP3, SP4, SP5 and SP6.

In view of the nature of the defence, where possession of the drug was totally denied by the accused, the question of rebutting the presumption of trafficking in heroin on a balance of probabilities does not arise. In my judgment, as against the prosecution case, the accused needs only to raise a reasonable doubt (*Yong Su Wan v. Public Prosecutor* [1998] 3 CLJ Supp 419).

Having considered the defence evidence in its totality and evaluate it in the light of the prosecution evidence, it is my view that the accused had failed to raise a reasonable doubt against the prosecution case.

First, during the prosecution case, there was never any suggestion put by the defence to the prosecution witnesses that the prosecution case was a fabrication. Indeed, during the cross-examination of SP2 and SP3 the issue of the alleged quarrel was never at all brought up by the defence.

The accused during examination in chief gave a detail and lengthy account of what transpired at the Immigration Complex, Bukit Kayu Hitam, on the day in question. Yet he did not rebut or even mention anything about the allegation by the prosecution's witnesses regarding the administration of the caution by SP6 and the giving of an oral cautioned statement. It was only during cross-examination by the DPP, when suggestions were put to the accused, that he mentioned about the statutory caution and the presence of SP6. He denied that he was ever cautioned by SP6 and he also denied having met SP6. He claimed that the first time that he saw SP6 was when SP6 gave evidence in court.

Further, I fail to see any reason as to why the prosecution witnesses should go all out to conspire to commit perjury merely to get the accused convicted. What would they gain by getting an innocent visitor to the country (assuming the accused story were to be believed) hung for drug trafficking? What could be the motive? They had no axe to grind against him. Indeed, none of the prosecution witnesses had ever met the accused before.

I found the accused guilty of the charge. He was convicted and sentenced according to the law.